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In The

Supreme Court of the United States

GERARDO DELGADO-GARIBAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err by denying Petitioner a certificate of appealability to review the district court's denial, without a hearing, of his ineffective assistance of counsel motion and motion to declare unconstitutional the Rules Governing Section 2255 Proceedings, where the record shows that Petitioner's pleadings made a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2) and that his numerous issues were clearly debatable among jurists of reason?

2. Did the Ninth Circuit also err by refusing to issue a certificate of appealability where Petitioner challenged the Rules Governing Section 2255 Proceedings as unconstitutional by being vague and susceptible to arbitrary application and providing the government dismissal as a remedy, when a petitioner exhibits lack of prosecution of a Section 2255 petition, but fails to provide the petitioner the same when the government is the one who abandons its duty to diligently prosecute its case?

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2. The failure by the court of appeals to issue a certificate of appealability here constitutes a far departure from accepted procedure because Petitioner's challenge to the Rules Governing Section 2255 Proceedings ("2255 Rules") as unconstitutional was meritorious and he fully complied with the requirement of § 2253(c)(2) by making a "substantial showing of the denial of a constitutional right." Moreover, this Court must grant this Petition to provide guidance to lower courts in their interpretation and application of the general language of § 2253(c)(2) and the 2255 Rules. 15

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gerardo Delgado-Garibay, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered on August 5, 2002.

ORDER BELOW

On August 5, 2002 the Ninth Circuit Court of Appeals filed its Order, pursuant to 28 U.S.C. § 2253(c)(2), denying Petitioner a certificate of appealability; the Order is attached herein as APPENDIX A.[1]

JURISDICTION

On December 17, 2001 Petitioner filed his notice of appeal with the Ninth Circuit of the district court's denial of his 28 U.S.C. § 2255 motion and the district court's total denial of a certificate of appealability. APPENDIX C.[2] On August 5, 2002, the Ninth Circuit Court of Appeals filed an Order denying Petitioner's request for a certificate of appealability to review the district court's denial of his Title 28 U.S.C. § 2255 motion to set aside his conviction. The district court's Order denying Petitioner's 2255 motion is included here as APPENDIX B.[3] The appellate court had jurisdiction pursuant to Title 28 U.S.C. § 2253 and its

[1] Hereinafter "Pet. App. A."

[2] Hereinafter "Pet. App. B."

[3] Hereinafter "Pet. App. C."

Order denying a certificate of appealability was entered pursuant to 28 U.S.C. § 2253(c)(2). APPENDIX A.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty or property without due process of law . . . ;

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ;

STATEMENT OF THE CASE

Following a jury trial in the U.S. District Court for the Eastern District of California, Petitioner (Mr. Delgado) and his co-defendants were found guilty of conspiracy to manufacture methamphetamine and manufacturing and aiding and abetting the manufacturing thereof. On 13 December 1995 the district court sentenced Mr. Delgado, then a young man in his late twenties, to life in prison. (Pet. App. B 1-2.) After his direct appeal and petition for certiorari before this Court were denied, on 23 February 1999, Petitioner timely filed in the district court his motion to vacate his conviction and life sentence pursuant to 28 U.S.C. § 2255, raising numerous instances of ineffective assistance of counsel supported by a sworn declaration from trial counsel. (Pet. App. B 2-3).

Upon the government's request, the district court granted the government an extension of time to file its opposition to Mr. Delgado's motion and extended the time for the opposition to 14 May 1999. However, 14 May 1999 came and passed and the government failed to file any opposition or pleading at all. So, almost one year after Mr. Delgado filed his motion to vacate, on 6 January 2000, the district court issued an Order to Show Cause why the government had failed to file its opposition to Mr. Delgado's 2255 motion. (Pet. App. B 32). The government then asked the district court for yet one more extension of time to file its now eight-month belated opposition telling the court that it had "lost" its "final version" of its opposition and was "unable to find the actual computer file on [its] hard drive." (Pet. App. B 33). For the second time, the court granted yet one more continuance and the government finally filed its opposition on 24 January 2000, almost an entire year after Mr. Delgado filed his 2255 motion. (Pet. App. B 33). Unlike Mr. Delgado's motion, the government's opposition was unsupported by any declaration at all. Mr. Delgado timely filed his Traverse noting the many factual inaccuracies and disputes in the pleadings before the court. APPENDIX D.[4]

Mr. Delgado then moved for summary judgment because of the government's lack of prosecution of its case and moved the district court to declare the Rules Governing Section 2255 Proceedings (2255 Rules) unconstitutional. However, the district court took almost two years

[4] Hereinafter "Pet. App. D."

before it issued its Memorandum and Order on 20 November 2001 denying Mr. Delgado's 2255 motion to vacate for summary judgment and his motion to declare the 2255 Rules unconstitutional. (Pet. App. B 1-35).

1. Approximately eight months after Delgado filed his notice of appeal of the denial of his 2255 motion, his motion to declare unconstitutional the Rules Governing Section 2255 Proceedings and his request for a certificate of appealability, the Ninth Circuit Court of appeals simply issued a one-sentence Order that read – "The request for a certificate of appealability is denied." The court then cited 28 U.S.C. § 2253(c)(2). (Pet. App. A 1). This was done despite the fact that Mr. Delgado raised in his 2255 motion to vacate a number of instances of ineffective assistance of counsel permeating the entire breadth of his case and a colorable constitutional challenge to the Rules Governing Section 2255 Proceedings. The lower court's Order was also reached without an evidentiary hearing on the many disputed facts and foreclosed appellate review despite the obvious record showing that Mr. Delgado indeed made a "substantial showing of the denial of a constitutional right" in his pleadings and declaration.[5]

In his ineffective assistance of counsel motion, Mr. Delgado alleged ineffective assistance in the following:

a) Failure to File Motions to Dismiss For Double Jeopardy, for Duplicity and Severance of Defendants;

[5] See, 28 U.S.C. § 2253(a) and (c)(2).

b) Failure to Make Motion for Mistrial on Grounds of Multiple Conspiracies;

c) Failure to Move to Dismiss Indictment for Impermissible Amendment or Fatal Variance;

d) Failure to Object and Move for Mistrial After Admission of Highly Prejudicial Testimony from Government's Chief Witnesses;

e) Failure to Object to Admission of Evidence in Violation of the Court's *In Limine* Rulings;

f) Failure To Make a Rule 29 Motion At All;

g) Failure to Challenge Credibility of Government's Three Chief Witnesses with Internal Inconsistencies in Their Testimony;

h) Mr. Delgado was also denied effective assistance of appellate counsel by the cumulative effect of the following significant errors;

i) Premature Raising of 4th Amendment Search Issue Without All Necessary Facts Required to Show Prejudice;

j) Failure to Raise Numerous Available and Meritorious Appellate Issues;

k) Gun Enhancement issue;

l) Wet Methamphetamine issue;

m) Leadership Role issue;

(Pet. App. B 10). Delgado supported his issues with a sworn declaration from his trial counsel.

The district court's Memorandum Opinion, filed almost two years later, addresses each of the issues raised by Mr. Delgado in order of appearance but fails to note the

inevitable interrelated nature of various issues and the critical facts. For example, the district court's analysis of trial counsel's failure to move to dismiss because of duplicity and for severance fails to grasp the legal significance of the unchallenged declaration from trial counsel and ample evidence of multiple conspiracies. (Pet. App. D 12, 18). Under oath, trial counsel declared, *inter alia,* that he – "did not file a motion for severance of defendants [or to dismiss because of duplicity] . . . because [he] simply did not think about them before trial and because [he] was overwhelmed by the discovery and volume of work in this case." The district court's conclusion about these admissions was that this "is inconsequential." (Pet. App. B 13).

The glaring legal error by the district court here is revealed by the absence from the discussion in the court's Memorandum and Order the trial record where co-counsel tells the district court in the midst of trial – "Also, there may be more than one conspiracy here." To which government counsel candidly replied – "That's true." (Pet. App. D 12). This passage clearly revealed a *Kotteakos v. United States,* 328 U.S. 750 (1946) multiple conspiracies situation and denial of due process and fair trial. Yet, the district court's Memorandum Opinion fails to discuss the legal significance of this critical, factual and legal issue at all. (Pet. App. B 14-18).

Also, in its belated Opposition to Mr. Delgado's 2255 motion, the government again admitted that evidence of a separate conspiracy was indeed admitted at trial. The government admitted:

> During December and January, 1994, [sic] Gonzales and James arranged to exchange ten pounds of methamphetamine for hydriodic acid in Las Vegas, California [sic] and were arrested

> upon their return to Tulare County. James and Wilson testified that they were obtaining the hydriodic acid for the defendant and hoped to trade it for ephedrine. There was no evidence that [Mr. Delgado] was aware of these activities or that Wilson had been a part of the same conspiracy to manufacture methamphetamine which involved the defendant. **As such, defendant correctly points out that there was evidence of a separate conspiracy which was introduced at trial.** The evidence was admitted because both Wilson and James testified in the case against the defendant in exchange for leniency in their cases which included the Las Vegas activities **and because such evidence was admissible against Gonzales to demonstrate his involvement in [Mr. Delgado's] conspiracy to manufacture methamphetamine**.

(Pet. App. D 12-13, emphasis added).

The district court's analysis of the multiple conspiracies/fatal variance issues raised by Mr. Delgado also failed to see that trial counsel's failure to make the required Rule 29[6] motion for judgment of acquittal essentially allowed a case riddled with multiple conspiracies and fatal variance of the indictment impermissibly go to the jury. First, where the issue raised was the **total failure to make** a motion for judgment of acquittal, the district court irrelevantly noted – "The failure to **renew** a motion for acquittal under Rule 29(b) has been held not to be ineffective assistance of counsel." (Pet. App. B 25, emphasis added). And, the district court's Memorandum and Order explicitly

[6] Federal Rules of Criminal Procedure.

recognized – "The fact that some evidence of other conspiracies was introduced [at trial] does not necessitate a finding of fatal variance." (Pet. App. B 19).

Indeed, the district court failed to meaningfully consider the constitutional deprivation by the failure of Mr. Delgado's trial counsel to also: 1) make the customary Rule 29 motion for judgment of acquittal at the close of the evidence; 2) failed to move for a mistrial once multiple conspiracies were apparent; 3) and failed to move to dismiss once variance was apparent in the middle of trial by the arguable proof of separate and distinct conspiracies from that charged in the indictment. (Pet. App. D 13).

2. The Ninth Circuit's denial of a certificate of appealability also left intact the district court's ruling on the questioned constitutionality of the Rules Governing Section 2255 Proceedings ("the Rules"). This issue was somewhat articulated in the district court's Memorandum and Order as follows:

> Second, Petitioner argues the Rules Governing Section 2255 Proceedings ("the Rules") are so unfair and biased towards the government as to constitute a violation of Petitioner's due process rights. . . . Petitioner's main contention is that Rule 9 is manifestly unfair because it allows the government a remedy of dismissal for a petitioner's delay in filing [sic] while affording a petitioner no such remedy for the government's delayed filing.

(Pet. App. B 33). This issue arose in this case because the government, as noted above, totally neglected its duty to diligently prosecute its case and ignored the district court's briefing schedule. The government's total disregard of Mr. Delgado's 2255 motion, with the court's approval, ran afoul

of the intended expeditious nature of 2255 proceedings. The district court noted Mr. Delgado's issue as – "Petitioner notes that habeas corpus is intended to be a 'swift and imperative remedy in all cases of illegal restrain of [sic] confinement." [Quoting *Rose v. Lundy,* 455 U.S. 509, 528 (1982)] (Pet. App. B 33).

The district court also somewhat articulated Mr. Delgado's vagueness issue regarding Rule 12 of "the Rules" when it noted:

> Contrary to Petitioner's claim to the contrary, Rule 12 is neither internally inconsistent nor impermissibly vague. . . . Rule 12 does not allow a court to do *whatever* it deems most appropriate, but instead allows a court to "apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, *whichever* it deems most appropriate."

(Pet. App. B 33-34, emphasis in original).

REASONS FOR GRANTING THE WRIT

1. The court of appeals has departed fundamentally, and allowed a similar fundamental departure by the district court, from the letter and spirit of the requirements set down by 28 U.S.C. § 2253(c) for the issuance of a certificate of appealability of the denial without a hearing by a district court of a 28 U.S.C. § 2255 motion to vacate a conviction. Here, Petitioner clearly made the requisite "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2) and that his numerous issues were clearly debatable among jurists of reason. Lower courts need this Court's guidance in this relatively new area of jurisprudence because § 2255(c)'s language is easily susceptible to arbitrary interpretation and inconsistent results that result in unchecked miscarriages of justice.

This Court in *Slack v. McDaniel*, ___ U.S. ___, 120 S.Ct. 1595 (2002), *inter alia,* stated:

> This Court has noted that . . . "First, when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after April 24, 1996 (the effective date of AEDPA), the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 U.S.C. § 2253(c) (*1994 ed., Supp. III*). This is true whether the habeas corpus petition was filed in the district court before or after AEDPA's effective date.

Slack at 1600. This Court also noted:

> Second, when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a

> COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack at 1601. Here, Mr. Delgado satisfied these requirements but was nevertheless denied a certificate of appealability for no discernible reason.

Here, Mr. Delgado's request for a certificate of appealability came in a case, not only where he raised numerous issues of ineffective assistance of counsel amounting to a deprivation of his Sixth Amendment right, but also raised the meritorious issue of the constitutionality of the Rules Governing Section 2255 Proceedings.

It is well-established that "As a general rule an attorney must investigate a case in order to provide minimally competent professional representation." *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984), *cert. denied,* 469 U.S. 1226 (1985), *citing United States v. Tucker*, 716 F.2d 576, 581-83, n. 16 and 18 (9th Cir. 1985) (as corrected); *see also*, *Morris v. State of Cal.*, 966 F.2d 448, 454-55 (9th Cir.), *cert. denied*, 113 S.Ct. 96 (1992) (failure to investigate and research a valid defense constitutes deficient representation). Furthermore,

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

United States v. Cronic, 466 U.S. 648, 659 (1984).

In Mr. Delgado's case, a readily available defense for him was that of multiple conspiracies even before that issue ripened in the midst of trial. By not having even raised the issue, counsel deprived Mr. Delgado of the "minimally competent professional representation" in the pre-trial preparation stage. As any reasonably competent lawyer would have researched motions for severance of defendants and to dismiss because of duplicity, Mr. Delgado's lawyer had an affirmative duty "to explore these defenses." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

The failure by trial counsel to file motions for severance of defendants and to dismiss the indictment because of multiple conspiracies was ineffective and prejudicial and affected the quality of his trial preparation in a fundamental manner. Ineffective because the failure to file the motions was not because of a tactical decision or because he had carefully considered and eliminated them. Prejudicial because, as noted by the district court, evidence and testimony came in at trial that was part of a separate conspiracy. This evidence and testimony rendered Delgado's pre-trial preparation almost non-existent because the evidence and testimony could have been excluded given a thorough pre-trial analysis of the relevant scope of the charged conspiracy.

Had Mr. Delgado's counsel filed a motion to sever defendants and for dismissal because of duplicity, his objection to the testimony as irrelevant and the duplicity issue would have ripened. But, since he failed to file either motion, Mr. Delgado was prejudiced because it was obviously too late for a severance and Delgado's attorney did not move for a mistrial.

The duplicity issue here also carried another danger – variance of the indictment to fit the proof produced at trail.

Under the Grand Jury Clause of the Fifth Amendment, a defendant is guaranteed the right to be tried only on the grand jury's indictment. *Stirone v. United States*, 361 U.S. 212, 217 (1960); *United States v. Olano*, 62 F.3d 1180, 1194 (9th Cir. 1995), *cert. denied*, 117 S.Ct. 303 (1996) and *United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991). The grand jury indictment-requirement "serves the notice-related functions of **protecting against unfair surprise, enabling the defendant to prepare for trial** and permitting the defendant to plead the indictment **as a bar to later prosecutions**." (Emphasis added). An indictment may not be broadened through actual or constructive amendment outside of the grand jury process. A "constructive amendment is *per se* error and always requires reversal." *Olson*, 925 F.2d at 1175.

In *United States v. Licciardi*, 30 F.3d 1127 (9th Cir. 1994), the Ninth Circuit quoted this Court's ruling in *Grunewald v. United States*, 353 U.S. 391 (1957) as follows – "Attempts by prosecutors 'to broaden the already pervasive and wide-sweeping **nets of conspiracy** prosecutions' are viewed 'with disfavor.'" *Licciardi,* at 1131. (Emphasis in original).

A variance occurs when the charging terms of the indictment are left unaltered but "different evidence supports the charged crime." *United States v. Pisello*, 877 F.2d 762, 765 (9th Cir. 1989). Although not every variance is fatal to an indictment, a legally significant variance occurs when "evidence presented at trial proves facts

materially different from those alleged in the indictment." *Olano* at 1194.

The single conspiracy/variance issue usually arises in cases such as this where multiple defendants are tried on one conspiracy or scheme count. Specifically, "where several defendants are tried together on one conspiracy but the evidence at trial shows more than one conspiracy, there is a possibility of prejudicial variance between the indictment and the trial proof." *United States v. Anguiano*, 873 F.2d 1314, 1317 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989) and *United States v. Broce*, 488 U.S. 563, 570-571 (1989), quoting *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("A single agreement to commit several crimes constitutes one conspiracy," but, "by the same reasoning, multiple agreements to commit separate crimes constitute multiple conspiracies.")

Reversal is required when "the variance is prejudicial to the substantial rights of the parties." *United States v. Kenny*, 645 F.2d 1323, 1334 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981); *see also Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946).

This is exactly what the record established here. Yet, the district court allowed the convictions to stand by denying Mr. Delgado's 2255 motion and foreclosing any review of his decision by totally refusing a certificate of appealability.

2. The failure by the court of appeals to issue a certificate of appealability here constitutes a far departure from accepted procedure because Petitioner's challenge to the Rules Governing Section 2255 Proceedings ("2255 Rules") as unconstitutional was meritorious and he fully complied with the requirement of § 2253(c)(2) by making a "substantial showing of the denial of a constitutional right." Moreover, this Court must grant this Petition to provide guidance to lower courts in their interpretation and application of the general language of § 2253(c)(2) and the 2255 Rules.

The Rules Governing Section 2255 Proceedings ("2255 Rules") for the United States District Courts became effective on February 1, 1977 by Pub. L. 94-426, § 1. The explicit purpose for these rules is stated in Rule 1 – "These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255. . . ." Furthermore, the Advisory Committee Notes make it eminently clear that a § 2255 petition is not like that brought by a state prisoner under § 2254 which is properly called a *habeas corpus* action and is considered a separate civil matter from the underlying state criminal case. The Advisory Notes make it clear that "a motion under § 2255 is a further step in a movant's criminal case **and not a separate civil action**. . . ." (Emphasis added). Thus, a petitioner under § 2255 is left to look for procedural guidance only upon the Rules Governing Section 2255 Proceedings (hereinafter – Rules) and not to any civil or criminal rule.

Rule 4(b) of the Rules requires, *inter alia*, that the § 2255 "**shall** be examined **promptly** by the judge to whom it is assigned." Rule 4(b) also requires that "the judge shall order the United States Attorney to file an

answer or other pleading within the period of time fixed by the court **or to take such action as the judge deems appropriate**." (Emphasis added). Additionally, Rule 5(b) contains a provision which may be helpful to the issue at hand. Rule 5(b) provides that, in the case where supplemental materials to the government's answer are deemed by the court necessary, the "court shall allow the government an **appropriate** period of time in which to do so, **without unduly delaying** the consideration of the motion." (Emphasis added). This provision of Rule 5 makes it explicit that expediency in the processing of § 2255 motions is the overriding goal of the Rules.

Rule 9 explicitly and exclusively provides the Government with a procedural remedy whenever a petitioner like Mr. Delgado causes delay in filing his pleadings. The Rule provides:

> *Rule 9. Delayed or Successive Motions*
>
> **(a) Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

The Advisory Committee Notes to Rule 9 make it eminently clear that good faith and due diligence by a petitioner in pursuing his motion are the desired goal of the Rules and cite case after case for the proposition that bad faith may be assumed whenever a petitioner intentionally allows time to pass before filing his motion. Due diligence is the ever-present concept in the Notes to Rule 9. Again,

such provision is **not** afforded a Petitioner like Mr. Delgado when it is the government that fails to observe due diligence and good faith. This oversight in the Rules is glaring and projects an appearance of favoritism to the government and arbitrary unfairness to petitioners like Mr. Delgado.

Finally, Rule 12 provides what seems to be the sole procedural vehicle that a petitioner can arguably invoke when the government is at fault and causes delay. Rule 12 provides:

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not **inconsistent with these rules**, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

(Emphasis added). Though the language of Rule 12 is permissive in nature and vests district courts with the discretion to proceed as they deem "most appropriate", there is no guidance nor any clear right, such as that provided in Rule 9 for the Government. Indeed, the very language of Rule 12 can result in inconsistent applications of the rule, depending upon what a given court "deems most appropriate." The phrase "deems most appropriate" is an obviously vague phrase and lacks guidance. *See generally, City of Chicago v. Jesus Morales, et al*, 527 U.S. 41 (1999), *Boos v. Barry*, 485 U.S. 312, 329-330 (1988) and *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) for discussion of inexact and vague language in loitering statutes which can be used as analogy for the due process analysis to the Rules at issue. To compound the problem,

the phrase "not inconsistent with these rules" is clearly restricting of a district court in doing what it "deems most appropriate."

It is in the vagueness of Rule 12, and facial inequality of the Rules as a whole, that a due process deprivation occurs for Mr. Delgado. The Fifth Amendment to the U.S. Constitution mandates that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " Long ago in *Murray's Lesee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855), in interpreting what the phrase "due process of law" meant, this Court observed that due process "is a restraint on the legislative as well as on the executive and the judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." Though these words were spoken long ago, they still carry the sound of correctness and speak directly to the facial inequity in the Rules at issue here.

It should not be the case in a nation of laws to have statutory schemes, such as the Rules here discussed, considered to comply with due process when they bluntly deny to a party that which is explicitly provided to the government in Rule 9. Indeed, any argument to the contrary would run afoul of Justice Frankfurter's interpretation of procedural due process as primarily concerned with providing individuals "the right to be heard before being condemned to suffer grievous loss of any kind." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). In Mr. Delgado's case, the Rules do not provide him the right to be heard the way they do for the Government.

Whether a procedural scheme, such as the Rules at issue, provides due process is a matter that can only be addressed on a case-by-case basis. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *see also*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The facts at bar seem to be of first impression and this specific constitutional challenge to the Rules appears to be the first of its kind.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: November 1, 2002

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. GERARDO DELGADO-GARIBAY, Defendant.	No. 01-17550 D.C. Nos. CV-99-5186-OWW CR-94-5011-1-OWW Eastern District of California (Fresno) ORDER (Filed Aug. 5, 2002)

Before: KOZINSKI and BERZON, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GERARDO DELGADO-GARIBAY, Defendant.	CIV F 99-5186 OWW CR F 94-5011 OWW MEMORANDUM AND ORDER RE: PETITION TO VACATE AND SET ASIDE CONVICTION AND SENTENCE PURSUANT TO 28 U.S.C. §2255 (Filed Nov. 20, 2001)

I. INTRODUCTION

Gerardo Delgado-Garibay ("Petitioner") petitions this court to vacate and set aside his conviction and sentence under 28 U.S.C. §2255. *See* Doc.551.

II. BACKGROUND

On September 15, 1994, Petitioner was charged by second superseding indictment with conspiring with Luis Enrique Estrada-Hernandez, Jose Luis Magallon, Alejandro Bucio-Delgado, Gerardo Hernandez-Sanchez, Jesse Ward James, Robert Gonzales, Danny Michael Wilson, Timothy Ray Scott, and John Vincent to manufacture and distribute methamphetamine between January 1, 1993 and June 30, 1994 (count one)[1] and manufacturing and aiding and abetting the manufacture of methamphetamine

[1] *See* 21 U.S.C. §846 and §841(a)(1).

between May 1993 and December 31, 1993 (count two)[2]. *See* Doc.131. On October 3, 1994, Petitioner entered pleas of not guilty. *See* Doc.141. After a fifteen-day trial, the jury returned verdicts on July 31, 1995, finding Petitioner guilty on both counts. *See* Docs.315, 316. On December 13, 1995, Petitioner received a life sentence for each count and judgment was entered five days later. *See* Docs.389, 391.

On appeal, Petitioner argued that he was ineffectively assisted by trial counsel who failed to move to suppress "Casio databank" evidence seized in an unrelated traffic stop. *See* Doc.565, p.13:11-12; Doc.562, Exh. A at p.10. Petitioner also argued the district court erred in finding that his offenses involved 100 pounds of methamphetamine and that he was a leader and organizer of criminal activity involving more than five participants. *See* Doc.565 at p.13:12-15; Doc.562, Exh. A at pp.12-13. On May 5, 1997, the Ninth Circuit affirmed Petitioner's conviction but vacated Petitioner's sentence and remanded his case for resentencing on the issue of whether he was properly sentenced using the formula for D-methamphetamine rather than L-methamphetamine when no evidence was introduced as to the type of methamphetamine involved. *See* Doc.565 at pp.13-14; Doc.562, Exh. A at p.2; *United States v. Magallon*, 113 F.3d 150 (9th Cir. 1997), *withdrawn by court order* on June 5, 1997. The order vacating Petitioner's sentence was itself subsequently vacated by the Ninth Circuit on September 15, 1997. *See* Doc.562, Exh. B. In *United States v. Scrivner*, 114 F.3d 964 (1997), the Ninth Circuit held that a district court did not err by

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[2] *See* 21 U.S.C. §841(a)(1) and 18 U.S.C. §2.

sentencing defendants using the D-methamphetamine standards when no evidence as to the type of methamphetamine involved is introduced and the defendant did not object during sentencing.[3] *See Scrivner*, 114 F.3d at 9670. The Ninth Circuit vacated its order to remand Petitioner's sentence on the ground that "*Scrivner* controls this case" and thus "[t]he district court did not commit plain error in sentencing the defendants on the basis that the methamphetamine involved was D-methamphetamine." *See* Doc.562, Exh. B at pp.3-4.

On February 23, 1999, less than one year after the Supreme Court denied his petition for certiorari, Petitioner filed this motion to vacate and set aside his conviction and sentence pursuant to 28 U.S.C. §2255. *See* Doc.551. Petitioner argues he should be granted the requested relief on the ground that he was denied effective assistance of counsel at trial and on appeal. *See id.* at pp.2-3. He argues his conviction should be vacated because it was obtained in violation of 18 U.S.C. §1622 prohibiting subornation of perjury. *See id.* at p.3:11. Petitioner also moves for summary or default judgment on the ground the government's delay in filing an opposition and the general unfairness of the rules governing section 2255 proceedings denied Petitioner his due process rights. *See* Doc.569.

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[3] The *Scrivner* case notes that the sentencing guidelines were amended on Nov. 1, 1995, to eliminate the distinction in penalties between the less potent L-methamphetamine and the more potent D-methamphetamine. *See Scrivner*, 114 F.3d at 967; U.S.S.G. §2D1.1. Although neither party addresses the issue, the old sentencing guidelines distinguishing between the two types of methamphetamine were apparently used for Petitioner's Dec. 13, 1995, sentencing since he was convicted before the amendment took effect.

III. LEGAL STANDARD

A. 28 U.S.C. §2255

Under Title 28 United States Code Section 2255, a habeas petitioner in federal custody must show:

> that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. . . .

28 U.S.C. §2255.

Thus, although collateral review under Section 2255 is broad, it does not encompass all claimed errors. *See United States v. Addonizio*, 442 U.S. 178, 185 (1979); *Hamilton v. United States*, 67 F.3d 761, 763 (9th Cir. 1995). "If a petitioner does not allege lack of jurisdiction or constitutional error, an error law will not provide a basis for habeas relief unless that error 'resulted in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure.'" *Hamilton*, 67 F.3d at 763-64 (quoting *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979)).

The court that originally sentences defendant must decide his motion for collateral relief. *See id.* A petition under 28 U.S.C. §2255 "may not do service for an appeal." *United States. v. Frady*, 456 U.S. 152, 165 (1982). Nonconstitutional sentencing errors that could have been raised on direct appeal but were not, are not cognizable in a §2255 motion, "cause and prejudice" notwithstanding. *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994). The cause for failure to raise an issue must be something external to the petitioner that prevented him

from having or being aware of a basis to allege his claim. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). The court cannot grant a §2255 motion based on nonconstitutional sentencing issues. *See Scott v. United States*, 997 F.2d 340, 341 (7th Cir. 1993).

B. Ineffective Assistance of Counsel

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984); *see also Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *United States v. Cronic*, 466 U.S. 648, 653 (1984) ("Without counsel, the right to a trial itself would be of little avail") (internal quotation marks and footnote omitted); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (the right to counsel "is meant to assure fairness in the adversary criminal process").

"[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). Counsel's failure to render "adequate legal assistance" can deprive a defendant of his Sixth Amendment right. *Cuyler v. Sullivan*, 446 U.S. 335, 344-350 (1980).

Under *Strickland*, a defendant must satisfy both prongs of a two-prong test to establish an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 687. The defendant must show that 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *See id.* A court need not evaluate both prongs of the *Strickland* test if the defendant fails to

establish one. *See Strickland*, 466 U.S. at 697; *Thomas v. Borg*, 159 F.3d 1147, 1152 (9th Cir. 1998).

1. Deficient Performance

First, the defendant must show that his counsel's performance was deficient, "[falling] below an objective standard of reasonableness". *See Strickland*, 466 U.S. at 688; *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000). The defendant must show "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*; *see Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (*en banc*). A convicted defendant must identify "the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690.

In reviewing counsel's performance, the court is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation. *See United States v. Cochrane*, 985 F.2d 1027, 1030 (9th Cir. 1993); *United States v. Davis*, 36 F.3d 1424, 1433 (9th Cir.). "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; *see Engle v. Isaac*, 456 U.S. 107, 133-134 (1982).

A strong presumption exists that counsel is competent and used professional judgment in making litigation decisions. *See United States v. Palomba*, 31 F.3d 1456, 1460 (9th Cir. 1994). A decision to waive an issue where there is little or no likelihood of success and concentrate

on other issues is indicative of competence, not ineffectiveness. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). As the Ninth Circuit has recently emphasized, "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir. 1998). While a lawyer is under a duty to make reasonable investigations, a lawyer may make a reasonable decision that particular investigations are unnecessary. *See Strickland*, 466 U.S. at 691. To determine the reasonableness of a decision not to investigate, the court must apply "a heavy measure of deference to counsel's judgments." *Id.*

Furthermore, a court must also gauge counsel's conduct in light of all the circumstances and from counsel's perspective at the time of trial. *See Strickland*, 466 U.S. at 688-89 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Because of the difficulties inherent in making the evaluation, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *See Strickland*, 466 U.S. 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Tactical decisions cannot form the basis of ineffective assistance of counsel claims; trial attorneys are permitted wide discretion in their choice of tactics. *See United States v. Ferreira-Alameda*, 815 F.2d 1251, 1254 (9th Cir. 1986); *United States v. Appoloney*, 761 F.2d 520, 525 (9th Cir. 1985).

2. Prejudice to Defendant

"Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To meet the prejudice requirement, the defendant must demonstrate that the errors "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693, 699-700 (rejecting claim in part because the evidence counsel failed to introduce probably would not have altered defendant's sentence); *Smith v. Robbins*, 528 U.S. 259, 285-87 (2000) (applying actual prejudice requirement where counsel followed all required procedures and was alleged to have missed a particular non-frivolous argument); *Roe*, 528 U.S. at 482 (actual prejudice required). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive defendant of any substantive or procedural right to which the law entitles him. *See Lockhart*, 506 U.S. at 372; *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989) (failure to raise a meritless legal argument does not constitute ineffective assistance of counsel).

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 693; *see United States v. Morrison*, 449 U.S. 361, 364-65 (1981). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."

Strickland, 466 U.S. at 693. Virtually every act or omission of counsel would meet that test, *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-67 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. *See id.* at 693.

In considering whether an error by counsel may have prejudiced a defendant's defense, a court must consider "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Id. 695-96.

"Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.*

IV. ANALYSIS

A. Ineffective Assistance of Counsel at Trial

Petitioner argues he was denied effective assistance of counsel at trial by the cumulative effects of the following errors: 1) failure to move to dismiss for double jeopardy; 2) failure to move for severance of defendants; 3) failure to move for mistrial on grounds of multiple conspiracies; 4) failure to move to dismiss the indictment for impermissible amendment or fatal variance; 5) failure to object and move for mistrial after the admission of highly prejudicial testimony; 6) failure to object to the admission of evidence in violation of the court's *in limine* rulings; 7) failure to challenge the credibility of the government's three chief witnesses; 8) failure to challenge the type of methamphetamine used to determine Petitioner's sentence; and 9) failure to make a Rule 29 motion.

1. Failure to Move to Dismiss for Double Jeopardy

Petitioner argues his counsel should have moved to dismiss on double jeopardy grounds because he was being prosecuted in a second, similar conspiracy case in Sacramento. Doc.551 at pp.4-5. The Fifth Amendment's Double Jeopardy Clause[4] prohibits a person from being prosecuted for the same offense after acquittal or conviction and from being given multiple punishments for the same offense. *See United States v. Chick*, 61 F.3d 682, 686 (9th Cir.

[4] The Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V.

1995). Petitioner does not dispute the government's contention that jeopardy had not yet attached in the Sacramento case before Petitioner's conviction in this case (the "Fresno case"). *See* Doc. 565 at p.36:16-17. There was no basis for a double jeopardy attack on the Fresno case. It was not objectively unreasonable for Petitioner's trial counsel not to do so as to the Fresno indictment. Nor did prejudice result from foregoing an attack based on double jeopardy grounds. Petitioner's conviction in this case could not have been attacked on double jeopardy grounds because he had not been previously tried for the same offense. The failure to move to dismiss the indictment in the Fresno case for double jeopardy did not prejudice Petitioner and was not ineffective assistance of counsel. *See Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982) ("The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel.").

Petitioner suggests his trial counsel was ineffective for not moving to dismiss the Sacramento case on double jeopardy grounds. *See* Doc.570 at p.14:26. Petitioner's section 2255 motion is directed at the judgment obtained in the Fresno case and may not be directed against any other case. *See* Rules Governing Section 2255 Proceedings, Rule 2(c).

2. Failure to Move for Severance

Petitioner alleges that his trial counsel's failure to move to sever his trial from other defendants in the case "was ineffective and prejudicial." Doc.551 at p.7:12. Counsel's choosing not to move to sever Petitioner was not objectively unreasonable. Fed.R. Crim.P. 8(b) allows the government to charge two or more defendants in the same

indictment if they are alleged to have participated in the same acts.[5] Rule 8(b) is broadly interpreted in favor of joinder to maximize efficiency. *See United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999); *United States v. Golb*, 69 F.3d 1417, 1425 (9th Cir. 1995). Co-defendants jointly charged are presumed to be jointly tried. *See United States v. Mariscal*, 939 F.2d 884, 885 (9th Cir. 1991).

Petitioner was one of multiple defendants charged with committing the same acts. *See* Doc.131. In order to be successful, a motion to sever must have shown that there was no logical relationship between the acts committed by the various defendants. *See Sarkisian*, 197 F.3d at 976. A defendant requesting severance must also demonstrate that joint trial will deprive him of some substantive right. *See United States v. Crowley*, 720 F.2d 1037, 1041 (9th Cir. 1983). The indictment alleged that all the defendants were coconspirators in a unified scheme to manufacture methamphetamine. *See* Doc.131. The court denied a motion to sever filed by defendant John Vincent. *See* Doc.212. Petitioner's trial counsel's declaration that he "did not file a motion for severance of defendants . . . because [he] simply did not think about them before trial

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[5] Rule 8(b) reads:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed.R. Crim.P. 8(b).

and because I was overwhelmed by the discovery and volume of work in this case" is inconsequential. Doc.553, Exh. B at ¶2. Petitioner fails to show any prejudice that denied him a fair trial. *See Crowley*, 720 F.2d at 1041. Not filing a motion to sever was not prejudicial since it would not have been successful and would not have affected the outcome. A co-defendant's severance motion was denied. *See Strickland*, 466 U.S. at 687. The case consisted of intertwined evidence of a number of co-conspirators. A separate trial for Petitioner would have been wasteful of court resources and would have emphasized Petitioner's capacity as a leader of the methamphetamine conspiracy. The failure to file a motion to sever does not constitute ineffective assistance of counsel.

3. Failure to Move Failure to Move [sic] for Mistrial on Grounds of Multiple Conspiracies

Petitioner argues the indictment was duplicitous and contained multiple conspiracies within a single count. *See* Doc.551 at p.8:2-4. Defects in the indictment must be raised before trial. Fed.R. Crim.P. 12(b)(2). Petitioner's failure to make a pre-trial duplicity objection to the indictment waives his right to object on this ground without a showing of good cause. *See* Fed.R. Crim.P. 12(f); *United States v. Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988).

Even if not waived, Petitioner's duplicity objection to the indictment fails. The indictment may charge only one violation in each count. *See Gordon*, 844 F.2d at 1400. When reviewing an indictment for duplicity, the indictment is reviewed "solely to assess whether the indictment itself can be read to charge only one violation in each count." *United States v. Martin*, 4 F.3d 757, 759 (9th Cir.

1993) (citation omitted). In Count I the indictment charges that Petitioner and others,

> beginning at a time unknown to the Grand Jury, but no later than on or about January 1, 1993, and continuing to on or about June 30, 1994, in the Counties of Tulare and Los Angeles, Eastern and Central Districts of California, the State and District of Nevada, and elsewhere, [defendants] did knowingly and intentionally conspire with each other, and with others whose identities are both known and unknown to the Grand Jury, to unlawfully and [sic] manufacture and distribute methamphetamine. . . .

Doc.131 at pp.1-2.

Count II charges that "defendants herein, between approximately May, 1993 and December 31, 1993, in the County of Tulare, State and Eastern District of California, did knowingly and intentionally manufacture and aid and abet the manufacture of methamphetamine. . . . " Doc.131 at p.2. Counts I and II each charge a single act and are not duplicitous. Trial counsel was not objectively unreasonable in failing to file a motion to dismiss based on duplicity of the indictment. Such a motion would not have been successful. Failure to file the motion was not prejudicial.

Petitioner's duplicity claim implicates a second point. If jurors are confused as to which act is charged within a single count, there is a possibility defendant may be convicted by a non-unanimous verdict in violation of his Sixth Amendment rights. *See Gordon*, 844 F.2d at 1401. Some jurors may vote to convict believing the defendant committed Act A, but not Act B, while other jurors may vote to convict believing the defendant committed Act B,

but not Act A. When a genuine possibility of such confusion exists, "the trial judge is obligated to give curative instructions or submit special interrogatories to ensure a unanimous verdict." *Id.*

The main thrust of Petitioner's argument is that the government provided evidence of multiple conspiracies to prove a single conspiracy count. Count I alleged the conspiracy began no later than January 1, 1993. The government introduced evidence that Maria Romero made purchases in late 1992. *See* Doc.551 at pp.8-9. According to Petitioner, the Romero testimony must have been evidence of a conspiracy other than the one charged in Count I. *See id.* Count I alleges the conspiracy as "beginning at a time unknown to the Grand Jury, but *no later than* on or about January 1, 1993." Doc.131 at p.1 (emphasis added). The indicting language does not eliminate the possibility that the conspiracy began *earlier* than January 1, 1993. It simply states that it began no later than that date. Evidence that acts occurring a few months earlier than January 1, 1993, are admissible to prove Count I.[6]

The government made a statement in opposition to defendant John Vincent's severance motion suggesting all

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[6] The court correctly allowed testimony about the pre-1993 activities, stating:

> The jury will be appropriately instructed on that issue. These are within three to four months of the date that isn't alleged with exact specificity, so I'm going to permit this to show the course of conduct, which I presume, from the pattern of the invoices, continues through the period of time into the conspiracy.

R.T. (Doc.416) p.1155:18-23.

defendants participated in a conspiracy to manufacture methamphetamine between January 1, 1993, and January 22, 1994. *See* Doc.570 at p.17:8-15. Petitioner cites this statement as proof Count I charged a conspiracy which began in 1993. Romero's testimony regarding acts occurring in 1992 must have been evidence of a second conspiracy improperly included in a single count. *See* Doc.551 at pp.8-9. As explained below, the government's statement in opposition to Vincent's severance motion was not inconsistent with the indictment and did not amend the indictment. Evidence of acts occurring in late 1992 is evidence of the conspiracy charged in Count I as "beginning at a time unknown to the Grand Jury, but *no later than* on or about January 1, 1993." Doc.131 at p.1 (emphasis added).

Even if the indictment did specify that the conspiracy began in January 1993, the Romero testimony about the acts in late 1992 would still have been admissible. In *United States v. Lai*, 944 F.2d 1434 (9th Cir. 1991), the indictment charged that the conspiracy began "at a time unknown to the Grand Jury and continu[ed] to in or about October, 1985. The indictment charged that specific acts were done to further the conspiracy as early as July of 1983." *Lai*, 944 F.2d at 1439 (internal quotation marks omitted). Nevertheless, the court held that testimony regarding drug transactions in late 1982 and in November of 1985 was direct evidence of the charged conspiracy. *See id.* The Romero testimony was properly admitted as evidence of the charged conspiracy and was not evidence of an uncharged conspiracy which could have confused jurors.

Petitioner also claims his prosecution in the Sacramento case shows the existence of a second conspiracy. *See* Doc.551 at pp.10-11. While the conspiracy alleged in Count

I in the Fresno case began no later than January 1, 1993, the conspiracy in the Sacramento case began no later than November 1, 1993. *See id.* Petitioner argues that since the government's own allegations charged two different conspiracies in overlapping time frames, Petitioner's attorney had notice that a likelihood of prejudicial juror confusion existed such that a motion for severance should have been made. *See id.*

The only allegation of conspiracy in the Fresno case is contained in Count I of the indictment. Count I charges a single conspiracy and is not susceptible to a contrary reading. The fact that the government was pursuing Petitioner in a separate case does not show that the government admitted evidence of two different conspiracies in the Fresno case such that the jury could have been confused about which conspiracy was being charged. Petitioner requested and received a "multiple conspiracies" jury instruction, telling the jury it must evaluate the guilt of each defendant separately and determine whether the defendants were involved in a single conspiracy. The jurors were told that should they find that Petitioner was a member of another conspiracy, they must acquit Petitioner of involvement in the charged conspiracy unless they found he was a member of any such other conspiracy. *See* Doc.565 at p.42:6-10; p.43:24-27.

A motion for mistrial based on multiple conspiracies would not have been granted. The issue was submitted to the jury with a court instruction as to the law. The jury made its decision based on a correct statement of the law and substantial evidence. Failing to move for mistrial based on multiple conspiracies was not prejudicial. Petitioner's counsel was not ineffective in failing to move for mistrial based on multiple conspiracies.

4. Failure to Move to Dismiss the Indictment for Impermissible Amendment or Fatal Variance

Petitioner argues the government made a statement in opposition to defendant John Vincent's severance motion which effectively amended the indictment. *See*-Doc.551 at p.5:14-19; Doc.570 at p.17:8-15. In opposing Vincent's motion, the government stated, "All defendants are charged with participation of a conspiracy to manufacture methamphetamine, between January 1, 1993, and on or about January 22, 1994." *See id.* By contrast, the indictment alleges the conspiracy began "at a time unknown to the Grand Jury, but no later than on or about January 1, 1993, and continuing to on or about June 30, 1994." *See* Doc.131.

The government's statement in its opposition to Vincent's motion to sever did not amend the indictment. The statement that all defendants were charged with the conspiring during a defined period of time is not inconsistent with the broader language in the indictment which allows for the possibility that defendants were conspiring before that period. Neither did any variance occur. The indictment charged a conspiracy to manufacture and distribute methamphetamine that began no later than January 1, 1993. *See* Doc.131. Evidence was introduced at trial to support that charge. The fact that some evidence of other conspiracies was introduced does not necessitate a finding of fatal variance. "The evidence need not be such that it excludes every hypothesis but that of a single conspiracy; rather, it is enough that the evidence adequately supports a finding that a single conspiracy exists." *United States v. Kenny*, 645 F.2d 1323, 1335 (9th Cir. 1981) (citation omitted). Here, the Ninth Circuit concluded

that the evidence before the district court was more than sufficient to establish the existence of the methamphetamine conspiracy. *See* Doc.562, Exh. A at p.11 (citing "the overwhelming evidence of Garibay's guilt").

The decision not to file a motion to dismiss the indictment for impermissible amendment or fatal variance was sound and was not ineffective assistance of counsel.

5. Failure to Object and Move for Mistrial after the Admission of Highly Prejudicial Testimony

Petitioner argues his trial counsel was ineffective in not objecting to testimony that Petitioner threatened to kill Maria Rosario Romero if she cooperated with police and in eliciting allegedly prejudicial testimony from witnesses. *See* Doc.551 at p.14:3-12, Exh. E. David Romero testified that Petitioner threatened witness Maria Romero. *See id.* at Exh. E. Maria Romero testified that she feared the defendants. *See id.* Cesar Romero testified that he was afraid for his sister's safety and that Petitioner "kills other people just for the fun of it." *Id.* Counsel for Petitioner did not object to this testimony. *See id.* Testimony was also elicited that Cesar Romero asked local law enforcement for help in arresting Petitioner's cousin, Javier Villalobos, who was wanted for murder. *See* Doc.565 at p.45:18-20. The court sustained an objection to some of this testimony, but subsequent testimony on this subject was admitted without objection. *See id.* R.T. (Doc.414) at p.726:1-6.

Threats to witnesses are admissible to demonstrate consciousness of guilt. *See Ortis-Sandoval v. Gomez*, 81 F.3d 891, 897 (9th Cir. 1996). A challenge to testimony about Petitioners' threatening Maria Romero would not

have succeeded. She was a material witness for the government. Petitioner had a strong motive to eliminate her as a witness. The government was entitled to have the jury consider the evidence. Even if such a challenge would have succeeded, Petitioner was not prejudiced by counsel's failure to do so because of the other overwhelming evidence of Petitioner's guilt. *See, e.g., United States v. Marsh*, 894 F.2d 1035, 1039 (1989). The testimony elicited from counsel regarding Cesar Romero's attempt to have Javier Villalobos arrested for murder was similarly diluted by the other significant evidence of Petitioner's guilt. A curative instruction would not have altered the outcome. The complained-of testimony "'did not so pervade the trial with prejudice so as to constitute an unfair trial.'" *United States v. Friedman*, 593 F.2d 109, 121 (9th Cir. 1989) (citing *United States v. Nace*, 561 F.2d 763, 769 (9th Cir. 1977)). Counsel's choice not to move for mistrial was not ineffective assistance of counsel.

6. Failure to Object to the Admission of Evidence in Violation of the Court's in Limine Rulings

Petitioner argues his trial counsel was ineffective in not objecting to evidence admitted allegedly in violation of the court's *in limine* ruling. *See*Doc.551 at p.14. On July 5, 1995, the court heard a motion *in limine* to preclude the introduction of two prior seizures of cash from Petitioner. *See* R.T. (Doc.409) at p.6. The first was a seizure of $25,000 at the U.S.-Mexico border. *See id.* at p.7:6-14; p.10:20-21. The second was a seizure of $59,000 in Kern County from a car in which Petitioner was a passenger. *See id.* at p.8:24; p.11:21. In its ruling, the court "require[d] the government to put on its evidence of what had

transpired in the conspiracy up until that time to make sure there was an operating conspiracy before that evidence [would] be admitted." *Id.* at p.18:10-14. The court limited the timing of the $25,000 evidence to after the government established a prima facie case of conspiracy involving Petitioner. *See id.* at p.18:14-17.

The court did not rule that the government could not refer to the seizures in its opening statement. *See id.* Counsel's failure to object to the government's reference to the seizures in its opening statement was not ineffective because such an objection would not have been sustained. Statements of counsel are not evidence, and the jury was instructed to that effect. During trial, testimony regarding Petitioner's arrest for passing money illegally through the U.S.-Mexico border was admitted. *See* R.T. (Doc.414) at p.699:6-p.700:12. This testimony was admitted after a prima facie case of conspiracy involving Petitioner had been established. *See, e.g., id.* at pp.666-683. The admission of this testimony was therefore not in violation of the court's *in limine* ruling. An objection to its admission would have been overruled. Petitioner does not argue any objection to the introduction of this testimony would have been sustained. Counsel was not ineffective in choosing not to object to the introduction of this evidence.

7. Failure to Challenge the Credibility of the Government's Three Chief Witnesses

Petitioner argues counsel's failure to challenge the credibility of the government's three chief witnesses, the Romero siblings, with internal inconsistencies in their testimony was ineffective assistance of counsel. *See* Doc.551 at p.15, Exh. F. The court remarked that counsel had "ably shown" inconsistencies in Cesar Romero's

testimony during closing arguments. *See* Doc.565 at p.47 (citing Sentencing Transcript (Doc.483) at p.122). Counsel could not have raised the inconsistencies in testimony during the examination of the witnesses. An attorney may not ask one witness about the testimony of another witness. *See United States v. Sanchez*, 176 F.3d 1214, 1219-20 (9th Cir. 1999); *United States v. Bao*, 189 F.3d 860, 866 (9th Cir. 1999). A witness cannot comment on the credibility of another witness's testimony. *See id.* Even if counsel had been allowed to challenge the internal inconsistencies of the Romero sibling's testimony during their testimony, Petitioner does not show how the outcome of the trial would have been different given the overwhelming evidence of his guilt. Counsel's handling of the Romero's inconsistent testimony was not ineffective.

8. Failure to Challenge the Type of Methamphetamine Used to Determine Petitioner's Sentence

Petitioner argues his counsel was ineffective in failing to object to the type and quantity of methamphetamine used to sentence him. *See* Doc.551 at p.16. In *United States v. Scrivner*, 114 F.3d 964 (1997), the Ninth Circuit held that a district court did not err by sentencing defendants using the D-methamphetamine standards when no evidence as to the type of methamphetamine involved is introduced and the defendant did not object during sentencing.[7] *See Scrivner*, 114 F.3d at 969-70. The Ninth

[7] The sentencing guidelines were amended on Nov. 1, 1995, to eliminate the distinction in penalties between the less potent L-methamphetamine and the more potent D-methamphetamine. *See*

(Continued on following page)

Circuit held that "*Scrivner* controls this case" and "[t]he district court did not commit plain error in sentencing the defendants on the basis that the methamphetamine involved was D-methamphetamine." *See* Doc.562, Exh. B at pp.3-4.

Counsel's failure to raise the difference between L-methamphetamine and D-methamphetamine is not objectively unreasonable. *See United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996). Petitioner relies on the reasoning in the original Ninth Circuit opinion in this case, *United States v. Magallon*, 113 F.3d 150 (9th Cir. 1997), *withdrawn by court order on* June 5, 1997. *See* Doc.551 at p.16. That opinion was withdrawn, and the order vacating Petitioner's sentence was itself vacated by the Ninth Circuit on September 15, 1997. *See* Doc.562, Exh. B. *McMullen*, conversely, has never been reversed.

Petitioner also fails to demonstrate that the outcome would have been different had counsel raised the issue of the type of methamphetamine used. Petitioner does not contend the methamphetamine he manufactured was L-methamphetamine. In addition, the record suggests evidence was presented to the jury of a high enough quantity of methamphetamine that Petitioner's sentence could have been supported even if he were sentenced using the L-methamphetamine standard. *See* Doc.565 at pp.48-49.

Scrivner, 114 F.3d at 967; U.S.S.G. §2D1.1. Petitioner was apparently sentenced under the old guidelines.

9. Failure to Make a Rule 29 Motion

Petitioner argues his counsel was ineffective in failing to make a Rule 29 motion. *See* Doc.551 at p.17:3-10. Federal Rule of Criminal Procedure 29 allows a court upon motion of defendant or on its own to enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction." Fed.R. Crim.P. 29(a). The failure to renew a motion for acquittal under Rule 29(b) has been held not to be ineffective assistance of counsel. *See United States v. Quintero-Barraza*, 78 F.3d 1344, 1350-51 (9th Cir. 1995). Further, even if a Rule 29 motion had been made, it would have been denied since the evidence was sufficient to sustain a conviction. *See United States v. Feldman*, 853 F.2d 648, 665-66 (9th Cir. 1988). The failure to make a Rule 29 motion did not prejudice the Petitioner and was not ineffective.

* * *

Petitioner argues that even if none of the above deficits in counsel's performance alone amounted to a deprivation of Petitioner's Sixth Amendment right to effective assistance of counsel, the alleged errors cumulatively amounted to ineffective assistance of counsel. *See* Doc.570 at p.13:26-p.14:2. The only claims that are susceptible to this accumulation argument are those relating to counsel's failure to make evidentiary objections. Petitioner fails to demonstrate that the total amount of evidence that would have been ruled inadmissible had more objections been made would have affected the outcome. Petitioner's argument that he was denied effective assistance of counsel at trial fails.

B. Ineffective Assistance of Counsel on Appeal

Strickland's two-pronged test is the proper standard for evaluating the effectiveness of counsel on appeal. *See United States v. Baker*, 256 F.3d 855, 862 (9th Cir. 2001) (citing *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986)). When evaluating the performance of appellate counsel, the two prongs partially overlap. *See Baker*, 256 F.3d at 862. Appellate counsel may not raise an issue because it has little or no likelihood of success. *See id.* "[W]eeding out . . . weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Id.* Appellate counsel will often perform competently (prong one) and cause no prejudice (prong two) in declining to raise a weak issue. *See id.*

Petitioner argues he was denied effective assistance of counsel on appeal by the cumulative effects of the following errors: 1) premature raising of a Fourth Amendment claim; and 2) failure to raise numerous issues including the enhancement of Petitioner's sentence because of his leadership role, possession of a gun, and the wetness of the methamphetamine.

1. Premature Raising of a Fourth Amendment Claim

Petitioner argues appellate counsel's failure "to substantiate the ineffective assistance [of trial counsel] argument with facts" was itself ineffective assistance of appellate counsel. Doc.551 at p.17:19-27.

Petitioner argues that there is a factual dispute created by Petitioner's trial counsel's declaration that he failed to render effective assistance of counsel. *See* Doc.570 at p.19:13. Petitioner argues that this alleged factual

dispute requires an evidentiary hearing since the Ninth Circuit did not have the declaration when it denied Petitioner's ineffective assistance of counsel claim on direct appeal. *See id.* No evidentiary hearing is required. The only "New facts" Petitioner proffers in support of his ineffective assistance of counsel argument are Petitioner's trial counsel's declaration and a Supreme Court case decided after Petitioner's appeal. The government does not dispute that the failure of trial counsel to file a motion to suppress the Casio databank was due to a lack of careful review. *See* Doc.565 at p.50 n.13. Petitioner's trial counsel's declaration that he did not make a pre-trial motion to suppress the Casio databank contrary to his usual custom and practice does nothing to change the Ninth Circuit's analysis that the failure did not prejudice Petitioner. *See* Doc. 562, Exh. A at pp.10-11. Since offering the declaration could not have changed the result, appellate counsel was not ineffective in not doing so.

Petitioner's reliance on *Knowles v. Iowa*, 525 U.S. 113 (1998), is misplaced. *See* Doc.551 at p.18:1-2. In *Knowles,* the Supreme Court ruled that a police officer who issued a motorist a citation rather than arresting him did not have the right under the Fourth Amendment to then search the motorist's car under the "search incident to arrest" exception. *See Knowles,* 525 U.S. 113. The search which led to the seizure of the Casio databank was reasonable under the Fourth Amendment because the driver of the vehicle consented to search, not because it fell within the "search incident to arrest" exception. *See* R.T. (Doc.418) at p.1545:19-24.

Petitioner fails to identify any facts which would have affected the outcome on appeal.

2. Failure to Raise Numerous Other Issues

Petitioner argues his appellate counsel was ineffective in not raising the issue of why Petitioner possessed a gun. *See* Doc.551 at p.18. Petitioner contends Cesar Romero testified during trial that Petitioner had a rifle for the purpose of hunting but that during sentencing Romero testified the gun was for protection. *See id.* At sentencing, Romero testified that Petitioner used the gun for protection and hunting quail. *See* Sentencing Transcript (Doc. 483) at pp.49-50. The court found "whether or not it was a hunting weapon . . . or whether it was a weapon that would be used for protection of the site . . . the weapon was present, the weapon was your weapon . . . in your control at the site and at your residence. . . . " *Id.* at p.130:11-16. The court recognized that conflicting testimony had been given about the purpose of the .22 caliber rifle. *See id.* at p.130:5-22. Trial testimony supported the inference that the rifle was used "for protection" in connection with the offense. Due to the presence of the rifle at the lab site and at the residence Petitioner maintained, a fact which the court found to be proven by a preponderance of the evidence, the two-level enhancement applied. *See id.* at p.130:14-16; p.131:22-24.

The Sentencing Guidelines provide for a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. §2D1.1(b)(1). Comment 3 to this section provides that ["t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet." *Id.* at Comment 3. Possession of the weapon during the commission of the

offense is sufficient to apply the enhancement. *See United States v. Willard,* 919 F.2d 606, 609 (9th Cir. 1990).

The court found that Petitioner possessed a rifle at the lab site and at his residence during the commission of the offense. *See* Doc.483 at p.130:11-16. An appeal of the gun enhancement would be subject to a "clear error" review. *See Garcia,* 909 F.2d 1346, 1349 (9th Cir. 1990). The finding that Petitioner was in possession of the weapon during the commission of the offense was supported by substantial evidence. It was not "clearly improbable that the weapon was connected with the offense." U.S.S.G. §2D1.1(b)(1) at Comment 3. An appeal on this issue would not have succeeded. Counsel was not ineffective in declining to appeal the gun enhancement.

Petitioner argues his appellate counsel was ineffective in failing to raise the issue that dry methamphetamine weighs less than wet methamphetamine. *See* Doc.551 at p.19. Petitioner argues the 100 pounds, or roughly 45 kilograms, of methamphetamine for which he was sentenced was wet and that, when dry, its weight would be decreased by half. *See id.* at p.19:9-17. At the time of Petitioner's sentencing, the U.S. Sentencing Guidelines provided for a level 38 if a defendant's offense involved 30 kilograms of a mixture containing methamphetamine or 3 kilograms of actual, or pure, methamphetamine.[8] Petitioner contends the 45 kilograms of methamphetamine was wet when weighed and would have weighed half as

[8] The level 38 amounts were subsequently reduced to 15 kilograms of a mixture containing methamphetamine and 1.5 kilograms of actual methamphetamine. *See* U.S.S.G. §2D1.1, Appendix C, Amends. 555, 594.

much, or about 22 kilograms (rounding down), when dry. *See* Doc.551 at p.19:12-13. Petitioner does not offer any reason why even if his theory that the mixture would have yielded 22 kilograms of methamphetamine, the amount is seven times in excess of the 3 kilogram minimum for a level 38 offense. Petitioner's appellate counsel was not ineffective for not raising the issue of wet methamphetamine because there is no reason to believe Petitioner was prejudiced even if the 100 pounds of methamphetamine was wet when weighed.

Petitioner argues his appellate counsel was ineffective in failing to challenge the enhancement he received for his leadership role. *See* Doc.551 at pp.19-20. Petitioner is mistaken. Appellate counsel did challenge the leadership enhancement. The Ninth Circuit rejected Petitioner's argument that the district court erred in finding he was a leader. *See* Doc.562, Exh. A at pp.12-13.

Petitioner argues his appellate counsel was ineffective in failing to challenge the court's denial of his motion to suppress evidence seized pursuant to search warrants. *See* Doc.551 at p.20:23-26. Defendant Magallon appealed the denial of the motion to suppress, and the Ninth Circuit upheld the denial. *See* Doc.562, Exh. a at pp.3-4. Petitioner fails to show how he was prejudiced by appellate counsel's choice not to challenge the denial of the suppression motion, nor does he provide hard facts or changed law. A district court has no authority to review the decision of the Court of Appeals on the search and seizure issue. Petitioner's appellate counsel was not ineffective.

C. Violation of 18 U.S.C. §1622

Petitioner argues his conviction must be vacated since it was obtained in violation of 18 U.S.C. §1622, which makes criminal subornation of perjury. Petitioner cites a Tenth Circuit case, *United States v. Singleton,* 165 F.3d 1297 (10th Cir. 1999) (*en banc*), *cert. denied,* 527 U.S. 1024 (1999), which vacated *United States v. Singleton,* 144 F.3d 1343 (10th Cir. 1998). *See* Doc.551 at p.21. The court in the *en banc Singleton* rehearing held that 18 U.S.C. §201(c)(2), an anti-gratuity measure prohibiting the exchange of anything of value for testimony, did not apply to bar concessions traditionally made by prosecutors to testifying informants. *See Singleton,* 165 F.3d at 1302. The Ninth Circuit has held that where a defendant did not raise an objection at trial to testimony admitted in asserted violation of 18 U.S.C. §201(c)(2), it is not plain error for the district court to admit such testimony. *See United States v. Hall,* 181 F.3d 1057, 1064 (9th Cir. 1999) ("where the defendant does not raise an objection under 18 U.S.C. §201(c)(2) at trial, it is not plain error for the district court to admit testimony procured by the government in arguable violation of that section"). Even if an arguable violation of 18 U.S.C. §201(c)(2) occurred, the district court's admission of any testimony procured in violation of that section was not plain error. Since Petitioner did not object on this ground at trial, this argument fails.

Petitioner argues the government violated a statute similar to the one involved in *Singleton,* namely, 18 U.S.C. §1622, prohibiting subornation of perjury. *See* Doc.551 at p.21. Paying informants may give them a motive to testify falsely, but such arrangements do not violate a defendant's due process rights. *See united States v. Cuello,* 96 F.3d 1179, 1183 (9th Cir. 1996). The jury was instructed to view

the testimony of informants with greater caution than that of other witnesses and to consider the effect any benefits received or to be received for the government would have on the informant's testimony. Petitioner offers no reasons why his motion should be granted on the ground his conviction was allegedly obtained in violation of 18 U.S.C. §1622.

D. Motion for Summary or Default Judgment

Petitioner argues he should be granted summary or default judgment for three reasons. First, Petitioner argues the government's delay in filing an opposition was apparently willful and violated Petitioner's due process rights. *See* Doc.569 at p.3. Petitioner filed his Section 2255 petition on February 23, 1999. *See* Doc.551. This court granted the government's extending time for response until May 14, 1999. *See* Doc.558. On January 6, 2000, the court issued an order to show cause why an opposition had still not been filed. *See* Doc.561. The government asked for and was granted additional time to comply with the court's order because it had "lost" the final version of the "motion" and was "unable to find the actual computer file on [its] hard drive." Doc.563, p.1:27-28. On January 24, 2000, the government filed its opposition. *See* Doc.565.

Petitioner notes that habeas corpus is intended to be a "swift and imperative remedy in all cases of illegal restraint of confinement." *See Rose v. Lundy,* 455 U.S. 509, 528 (1982) (Blackmun, J., concurring). However, the delay in this case was not so long or inexcusable as to be grounds for summary or default judgment. The court properly exercised its discretion in granting extra time to the government. The court exercised similar discretion in

granting extra time to Petitioner to file a traverse. *See* Doc.568. Petitioner points to no authority to the contrary.

Second, Petitioner argues the Rules Governing Section 2255 Proceedings (the "Rules") are so unfair and biased towards the government as to constitute a violation of Petitioner's due process rights. *See* Doc.569 at p.6. Petitioner's main contention is that Rule 9 is manifestly unfair because it allows the government a remedy of dismissal for a petitioner's delay in filing while affording a petitioner no such remedy for the government's delayed filing. *See* Rule 9; Doc.569 at p.7:1-11.

Rule 12 allows the district court to "proceed in any lawful manner not inconsistent with these rules." Rule 12. Contrary to Petitioner's claims to the contrary, Rule 12 is neither internally inconsistent nor impermissibly vague. *See* Doc.569 at pp.7-8. Rule 12 does not allow a court to do whatever it deems most appropriate, but instead allows a court to "apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, *whichever* it deems most appropriate." Rule 12 (emphasis added). There is simply no "problem" with directing a court to "proceed in any lawful manner not inconsistent with these rules" and allowing it to choose whether to apply criminal or civil rules of procedure in so doing. *Cf.* Doc.569 at p.8:2. In allowing district courts to exercise discretion, Congress acknowledges that a basic function of the judicial branch is to exercise judicial discretion within limits defined by rules and statutes. In providing a way for the government to dismiss Section 2255 petitions long left unpursued, Congress has in no way silenced Petitioner's purported due process "right to be heard." *See* Doc.569 at p.8:25. Petitioner's claim that the Rules' denial of a reciprocal right to dismiss amounts to a denial of due process fails.

His claims have been fully and comprehensively considered.

Third, Petitioner argues the government's apparently willful failure to follow the court's order to file its opposition by May 14, 1999, must somehow be remedied, preferably with an entry of default judgment in favor of Petitioner. *See* Doc.569 at p.9. It was within the court's discretion to allow the government leave to file its opposition. petitioner's request for default judgment is DENIED.

V. CONCLUSION

Petitioner's petition for an order to vacate and set aside his conviction and sentence under 28 U.S.C. §2255 is DENIED.

A certificate of appealability SHALL NOT ISSUE for the reasons stated above. No issue debatable among jurists of reason has been presented.

SO ORDERED.

DATED: November 20, 2001

/s/ Oliver W. Wanger
Oliver W. Wanger
UNITED STATES
DISTRICT JUDGE

APPENDIX C

EZEKIEL E. CORTEZ
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California State Bar # 112808
(619) 237-0309

Attorney for Defendant: Gerardo Delgado-Garibay

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	CV. F-99-5186-OWW CR. F-94-5011-OWW
Plaintiff,	**NOTICE OF APPEAL**
vs.	(Filed Dec. 17, 2000)
GERARDO DELGADO-GARIBAY	
Defendant.	

Notice is hereby given that the defendant/petitioner, Gerardo Delgado-Garibay (Mr. Delgado), by and through his counsel of record, Ezekiel E. Cortez, and pursuant to Rule 4(1)(B), Federal Rules of Appellate Procedure hereby appeals to the Ninth Circuit Court of Appeals the district court's order, entered on November 20, 2001, denying his Title 28 U.S.C. § 2255 motion and denying totally a certificate of appealability as to all issues.

Respectfully Submitted,

Dated: 12-14-01 /s/ Ezekiel E. Cortez
Ezekiel E. Cortez
Attorney for Defendant-Petitioner
Gerardo Delgado-Garibay

APPENDIX D

EZEKIEL E. CORTEZ
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Attorney for Defendant: GERARDO DELGADO-GARIBAY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
(HONORABLE OLIVER W. WANGER)

UNITED STATES OF AMERICA	No. CIV F-99-5186-OWW No. CR-F-94-5011-OWW
Plaintiff,	**PETITIONER'S TRAVERSE**
vs.	(Filed Feb. 29, 2000)
GERARDO DELGADO-GARIBAY	
Defendant/Petitioner	

TO: CHARLES J. STEVENS, UNITED STATES ATTORNEY; AND KATHLEEN A. SERVATIUS, ASSISTANT UNITED STATES ATTORNEY:

Petitioner, Gerardo Delgado-Garibay (Mr. Delgado), hereby files his Traverse to address factual and legal inaccuracies in the government's belated Opposition. This traverse will address the Government's allegations of fact and legal issues in chronological order. First, a brief introduction is necessary because there appears to be a common thread in the government's Opposition – distortion of facts. These factual inaccuracies are primarily

contained in the section entitled "FACTS" and subsection II entitled "Trial And Sentencing Evidence."

INTRODUCTION

The creative factual allegations in the Government's Opposition, unsupported at all by any sworn declaration, paint an uncertain picture of exactly how many conspiracies exited, [sic] who the conspirators were and when it was that they started. These facts are important because they are determinative of whether there is a dispute in the pleadings before this Court which can only be resolved through an evidentiary hearing pursuant to Rule 8(a), Rules Governing Section 2255 Proceedings, the scope of the charges alleged against Mr. Delgado and the relevant conduct which should be attributed to him.

The Government's unsupported factual allegations also create a dispute with the facts and sworn declaration filed by Mr. Delgado, making an evidentiary hearing necessary because this Court should not make credibility findings solely on conflicting pleadings. *United States v. Blylock,* 20 F.3d 1458, 1465, 1469 (9th Cir. 1994); *United States v. Bigman,* 906 F.2d 392, 394 (9th Cir. 1990); *United States v. Popoola,* 881 F.2d 811, 812 (9th Cir. 1989); and, *Stokes v. United States,* 652 F.2d 1, 2 (7th Cir. 1981), *cert. denied*, 464 U.S. 836 (1983) (holding it was reversible error not to have an evidentiary hearing to resolve material factual dispute). If anything, the facts alleged by Mr. Delgado should carry more weight because they are supported by a sworn declaration where the Government's are not. These factual disputes, *inter alia*, will be outlined below in order of appearance.

1. Government's Citation To The Evidence It Selectively Presented At Trial

Throughout the "FACTS" section of its Opposition and within the argument sections, the Government liberally cites to the evidence it presented at trial for support of its various arguments. This reliance is misplaced because the facts presented at trial are not complete nor do they present an accurate picture of all the material and relevant facts. And, because a lot of the facts cited by the Government support, not its arguments, but Mr. Delgado's. Indeed, several of the facts presented by Mr. Delgado's Petition had not been made part of the record herein, never considered by the 9th Circuit Court Of Appeals nor have they been adequately discussed by the Government.

One of the factual issues raised by Mr. Delgado is his trial counsel's ineptitude and lack of preparation. Such ineptitude and lack of preparation led partially to the incomplete and misleading nature of the trial facts so confidently espoused by the Government. Significantly, his trial counsel also happened to represent Mr. Delgado in the suspiciously similar and contemporaneous conspiracy case in Sacramento (see pages 4-5 of Mr. Delgado's Petition). Though the Government attempts painfully to separate the two cases by splitting hairs, the fact remains that Delgado's trial counsel never presented the facts of the Sacramento case to this Court or to the jury to show separate conspiracies.

At page 15 of the Government's Opposition, it is stated:

> The government's trial and sentencing evidence proved that the defendant was **the leader and**

> **organizer** of a **methamphetamine conspiracy** which operated from 1992 through September, 1994. The defendant organized individuals to purchase precursor chemicals, laboratory equipment, and arranged for a laboratory site in Porterville, California. Manufacturing activities occurred at this location once or twice times [sic] a month from May, 1993 to January, 1994. The government presented evidence which had been acquired by different law enforcement agencies over a two year period.

Government's Opposition at 15, lines 3-9, (emphasis added). The Government proved no such thing at all!

First, the alleged single conspiracy in this case was said **by the Government** itself to have started, not in 1992 as falsely stated in the preceding quote, but "between January 1, 1993, and on or about January 22, 1994." **See**, Government's Opposition filed December 5, 1994 to co-defendant Vincent's Motion for Severance. **See** also, page 37 of the same Government's Opposition where she explicitly contradicts the preceding quote by saying – "In this case, the indictment and evidence charged the defendant with his participation in manufacturing methamphetamine for distribution in Tulare County distribution [sic] elsewhere **from January, 1993** to June, 1994." Second, this allegation, presented at trial, is not an accurate picture of the facts known to the Government about its separate investigations and those by state authorities into the same diverse individuals in this and other cases.

Closely tied to the misleading use of "facts" regarding the multiple conspiracy issue and whether Mr. Delgado was the leader and organizer in the instant conspiracy is the Government's telling choice of words at page 16, lines

3-7 where it states – "Robert Gonzales and Jesse James rented property in Porterville, California, from John Vincent **and arrange for the defendant and his workers** to manufacture methamphetamine at that site in exchange for methamphetamine." (emphasis added) Clearly, Gonzales and James played a managerial role vis a vis Mr. Delgado; it was not them who, according to the Government, engaged directly in the hazardous and manual labor nature of the methamphetamine manufacture process. It is almost comical to suggest that the "leader and organizer" of the alleged conspiracy is down there exposing himself to the dangers of chemical poisoning and hazards endemic to the clandestine laboratory activity in exchange for relatively small amounts of the methamphetamine he allegedly made for Gonzales. Gonzales and James are the ones that appear to be the organizers and leaders!

Again, at page 18 of its Opposition, the Government continues with its telling use of facts. There, it plainly asserts:

> Jesse James and Robert Gonzales **arranged for the defendant** and his workers to use a portion of John Vincent's ranch in Woodlake, California to manufacture methamphetamine. . . . While at Gonzales' residence in Porterville, Gonzales introduced James to the defendant (referring to him as "Tio") and Estrada (referring to him as "Kiki" and "Henry") as the "border brothers" who would be manufacturing methamphetamine at Vincent's ranch. . . . Gonzales told James the individuals manufactured methamphetamine once or twice a month at the Vincent ranch **in exchange for two pounds of methamphetamine each time**. . . . Gonzales also told James

> that the defendants make from one to one hundred pounds of methamphetamine at a time.

(Emphasis added) This type of factual claim by the Government to support its stillborn argument that Mr. Delgado was the "leader and organizer" of the conspiracy charged is highly dubious at best. A bit of academic logic exposes the fallacy in the Government's argument.

Assuming, to give the Government the benefit of the doubt, that the amount of methamphetamine manufactured twice per month by the "border brothers" at the Vincent ranch was the maximum of two hundred pounds ("one to one hundred pounds of methamphetamine at a time"), the alleged "leader and organizer" of the charged conspiracy received a meager "two pounds of methamphetamine each time" for his hazardous and hard labor!! While, those who "**arrange** for the defendant and his workers" to manufacture the methamphetamine, got one hundred and ninety six pounds!!!! This allegation hardly militates for the Government's ridiculously transparent argument! Instead, it shows that Mr. Delgado is not the "leader and organizer" as inconsistently argued by the Government.

As though these revealing facts were not enough, the Government goes even further on the same page and adds:

> Danny Wilson first met Gonzales in July, 1993 and obtained methamphetamine from him four or five times. . . . The methamphetamine was always wet, indicating that it was recently manufactured. . . . Sometime in the fall of 1994, Gonzales brought wet methamphetamine to Wilson and asked him to "clean and cut it". . . . Wilson was to whiten the methamphetamine, and

> then dilute it with another powder. . . . This happened on two or three other occasions.
>
> . . .
>
> Gonzales told Wilson that he was getting the methamphetamine **from "his crew"** who were making it at the Vincent ranch.

(emphasis added) According to these facts graciously provided by the Government, the "crew" that Gonzales described as "his crew" was Mr. Delgado and others. It is obvious from the preceding quotation that it is Gonzales who appears to be the "leader and organizer" here, not Mr. Delgado who plainly discharged the job of a crew member and laborer. The Oxford English Dictionary defines "arrange" as "1. Put into the required order; 2. Plan or provide for; 3. Take measures; make plans; give instructions."

Clearly, when Gonzales "arranged" for "his crew" to do what he directed them to do, he was leading and organizing that "crew" to do as he asked and paid them a maximum of two pounds out of every hundred of the finished product they were laboring to complete. This payment constitutes a meager 2% wages; far less than an efficient waiter or waitress would get after serving a meal at a restaurant. This hardly makes Mr. Delgado the "leader and organizer" of the alleged single conspiracy charged in this case. It does make Gonzales the chief "organizer" because he meets with everyone at his house, seems to introduce all to each other and seems to control the largest amount of the manufactured drug (98 pound out of every 100 "cooked").

At page 19, lines 4-9, the Government again provides ample proof against its argument and for the logical inference that it was Gonzales, not Mr. Delgado, who was

the "leader and organizer" here. There, the Government states:

> In December, 1993, Gonzales took Wilson to the Vincent ranch in Woodlake to obtain 10 pounds of red phosphorus, 5 gallons of hydriodic acid, and 15 pounds of ephedrine. . . . **Wilson used** the chemicals to manufacture methamphetamine **for Gonzales and James**. . . . Gonzales also brought "Pancho", one of defendant's workers, to Wilson's residence during this time, to pick-up [sic] some hydriodic acid that had not yet been used. . . . This individual was angry because Gonzales and Wilson had taken their chemicals.

(Emphasis added). Here, it is Wilson now who Gonzales is using and directing to "cook" for him. Gonzales even goes as far as to take the chemicals that were used by others making "Pancho" angry but obviously doing as he pleased. Such actions can only be taken by the "leader and organizer" of an enterprise.

Aside from being self-contradictory, the Government's use of "facts" is highly selective and misleading. A clear example of the Government's misleading citation to "facts," to bolster its argument that Mr. Delgado was an organizer and leader in the conspiracy at hand, can be found at page 15, lines 13-14. There, the Government confidently alleges – "First, the defendant recruited and directed the activities of Maria Rosario Romero who was arrested on June 17, 1993. . . . " Similarly, at page 16, lines 17-28 the Government cites "facts" regarding Maria Romero and Mr. Delgados' alleged directing of her illicit actions. All of these "facts" are completely irrelevant to the conspiracy at hand because they occurred before the creation of the conspiracy charged – "January 1, 1993."

Conveniently, the Government forgot its very own pleadings where it admitted – "All defendants are charged with participation of a conspiracy to manufacture methamphetamine, **between January 1, 1993, and on or about January 22, 1994**." See, Mr. Delgado's Petition at page 5, lines 13-19.

However, note should be made that, in this point as in others, there is a clear dispute in the facts presented in the pleadings in this 2255 case. This, and the other factual disputes noted below, must be resolved by this Court.

What the Government omits in connection with Maria Romero is any reply to the facts discussed by Mr. Delgado at pages 5 and 8-9 of his Petition. There, Mr. Delgado raises facts showing that the alleged recruitment and directing of Maria Romero was before the starting date of the conspiracy at hand! Indeed, at pages 8-9 of his Petition, Mr. Delgado quotes a portion of the trial transcript where the irrelevancy of Maria Romero's testimony was raised and where AUSA Faller adopted defense counsel's argument that there "may be more than one conspiracy" in this case by admitting on the record – "That's true."! Yet, no discussion at all of these facts is included by the Government in its misleading reference to Maria Romero.

There is also a noticeable absence in the "FACTS" by the Government of the declaration submitted by Mr. Delgado's trial counsel regarding his failure to timely raise the issue of duplicity until it arose in the middle of trial. This is a key issue because the Government falsely attempts to paint a very neat and tidy picture of the trial facts which, according to the Government, "proved that the defendant was the leader and organizer of a methamphetamine conspiracy." Had Mr. Delgado's trial counsel

timely raised the duplicity issue, many of the "facts" which were injected by the Government in the middle of trial would not have made it. A prime example lies an AUSA Faller's admission quoted in the preceding paragraph.

Again at pages 21-22, in the subsection entitled "*The December, 1993 Methamphetamine Cook*", the Government provides facts that can only mean that Mr. Delgado is anything but a "leader and organizer" in the alleged single conspiracy at issue. For instance, at page 21, lines 12-25 and footnote 6, the Government clearly outlines facts which reveal Gonzales again to be the one in charge of everyone mentioned. However, in the preceding paragraph at lines 7-14, the Government makes contradictory and illogical claims. It states:

> Cesar Romero went **with the defendant** to a laboratory site in Porterville in December, 1993. . . . The defendant asked Cesar to accompany him as he made preparations for the cook and picked up red phosphorous which he hid in a secret compartment in his 300 ZX car. . . . The defendant told one of his workers **he could not go to the laboratory site,** and **asked Romero to go in his** place.[] **The Defendat and Romero** eventually arrived in Porterville following the defendant's instructions. . . . Upon arriving in Porterville, **the defendant and Romero** first stopped at a garage where they looked for other individuals, and then went to Gonzales' house.

(Emphasis added) The logical inconsistency in the preceding paragraph is obvious! If "the defendant" couldn't go to the laboratory site and asked Romero to go in his stead, then he could not have ever arrived and performed all of the actions attributed to him in the rest of page 21 and

half of page 22! Pages 22 trough [sic] 32 need not be addressed here as they will be under the arguments section below.

The rest of the facts cited by the Government in pages 22-25 show, at most, that many individuals and some of Mr. Delgado's co-defendants were actually engaged in illicit activity. Those facts do not, however, establish that Mr. Delgado was the "leader and organizer" of all these individuals. These facts arguably show that Mr. Delgado was merely one of many individuals who were loosely doing illicit acts but mostly coordinated and overseen by Gonzales, the common hub between all the other spokes.

As presented in this Traverse and in Mr. Delgado's Petition, the facts herein discussed have never been considered in this context by this Court nor by the 9th Circuit.

2. The Government's Arguments

This Traverse will not address all of the arguments made in the Government's Opposition because there is no need to do so. Many of the arguments therein simply beg the question. What will be addressed here will be the factual anemia and legal vacuum vexing most of the Government's Opposition.

A. Whether "Trial Counsel Was [] Ineffective (failure to move to dismiss and for severance of defendants)"

It strains reason to attempt to read the Government's argument here. It essentially but bluntly argues that, because motions to dismiss and for severance would "not have been successful", then counsel was not ineffective.

First, what the Government misses in this entire argument is the threshold standard applicable to this issue announced in *Strickland v. Washington*, 466 U.S. 668 (1984) or *United States v. Cronic*, 466 U.S. 648 (1984). There is absolutely no mention at all in the Government's substandard treatment of this ineffectiveness issue of *Strickland* or *Cronic* at all; that is, except for the "Table of Authorities" at page vi where it lists the starkly incomplete title "*Strickland* ostensibly cited within the body of the Opposition at "41,42,43." When one proceeds to pages "41,42,43" there is no mention at all of "*Strickland*".

Having ignored the *Strickland* and *Cronic* standards, the Government's analysis of this issue is shallow and mistaken. Mr. Delgado's trial counsel was clearly ineffective because the motions to dismiss and for severance were motions he would have normally filed because the facts in this case made them obvious choices. Indeed, Delgado's trial counsel confessed ineffectiveness in his sworn declaration. Perhaps that is why the Government never addresses the substance of Attorney Araujo's sworn declaration. The issue here for this Court is one of prejudice, not ineffectiveness.

In his sworn declaration, Attorney Araujo expressly confesses ineffectiveness and states that the issue of duplicity never occurred to him until it arose in the middle of trial when co-counsel Homola raised it. This point is significant and addresses the issue for this Court of whether there is prejudice. In the colloquy quoted in Attorney Araujo's declaration there is a subtle but significant fact. When co-counsel Homola told this Court – "Also, there may be more than one conspiracy here." Assistant U.S. Attorney Faller's candid reply was – "That's true"! This was clearly a *Kotteakos v. United States*, 328 U.S. 750

(1946) problem in the middle of trial. At that late point, this Court was not going to call a mistrial and did not address the matter but simply overruled the objection by the defense.

Indeed, the Government has admitted that evidence of other conspiracies was admitted at Mr. Delgado's trial. At page 41-42, lines 91-24 and 1-5, respectively, discussing the activities of Mr. Delgado's alleged co-conspirators – Danny Wilson, James and Gonzales – the Government concedes:

> During December and January, 1994, [sic] Gonzales and James arranged to exchange ten pounds of methamphetamine for hydriodic acid in Las Vegas, California and were arrested upon their return to Tulare County. James and Wilson testified **that they were obtaining the hydriodic acid for the defendant and hoped to trade it for ephedrine. There was no evidence that the defendant was aware of these activities or that Wilson had been a part of the same conspiracy to manufacture methamphetamine which involved the defendant.** As such, defendant correctly points out that there was evidence of a separate conspiracy which was introduced at trial. The evidence was admitted because both Wilson and James **testified in the case against the defendant** in exchange for leniency in their cases which included the Las Vegas activities **and because such evidence was admissible against Gonzales to demonstrate his involvement in the defendant's conspiracy to manufacture methamphetamine**.

(Emphasis added) Exactly why the Government is saying this inadmissible evidence was admitted by this Court

remains an enigma, judging from the semantic gymnastics displayed in the preceding quote. Was the irrelevant evidence admitted because Wilson and James were testifying "against the defendant?" Was it because it somehow established Gonzales' "involvement in the defendant's conspiracy?" If such testimony is admittedly evidence of a separate conspiracy of which Mr. Delgado had no knowledge, then how is it relevant and how does it show Gonzales' part in an entirely separate conspiracy – the one charged against Mr. Delgado? This Court is asked to make impossible and untenable logical leaps.

There is an irony in the Government's argument against the duplicity issue. At page 35, lines 13-19 of its Opposition, the Government argues that Mr. Delgado has not demonstrated prejudice by the joint trial beyond arguing the existence of duplicity. The Government then goes on to say – "claims of multiple conspiracies may only be made as challenges to the sufficiency of the evidence at trial." The comical irony here is that Mr. Delgado's trial counsel utterly failed to – 1) make the customary Rule 29 motion for judgment of acquittal at the close of the evidence; 2) failed to move for a mistrial once multiple conspiracies were apparent; 3) failed to move to dismiss once variance was apparent in the middle of trial by the arguable proof of separate and distinct conspiracies from that charged in the indictment! The showing made by Mr. Delgado is that the **accumulation** of trial errors caused him prejudice because the Government's burden was lessened by his trial counsel's many errors and lack of effective advocacy.

B. Whether A Motion To Dismiss Because of Double Jeopardy Should Have Been Made

The Government's attempt to show that the two contemporaneous cases against Mr. Delgado were two separate conspiracies has failed. The issue here is not simply one of double jeopardy but also one of *Brady* material and ineffective assistance to meaningfully investigate and challenge the indictment at hand. As noted in Mr. Delgado's Petition, the same trial counsel, Attorney Araujo, represented Mr. Delgado in the Fresno and Sacramento cases. Had he adequately investigated both cases, he would have found that they appeared to be the same common plan, scheme or conspiracy and had common acts and parties. See, Points and Authorities provided by the Government in its Opposition at pages 33-35 on the issue of duplicity.

At page 36, lines 20-23 the Government makes another questionable and unhelpful claim. It declares – "And any argument that the Sacramento case is barred by double jeopardy must be made in that case, **and the defendant waived the argument by entry of his plea of guilty and also because of a specific waiver of appeal and collateral attack in that plea agreement**." Such waivers, without knowing all of the facts, and failure to spot the potential double jeopardy or multiplicity issues by Attorney Araujo militate against the Government and not for it. Even a little adequate investigation into the cases against Mr. Delgado would have reveled [sic] the basis for a motion to dismiss either because of multiplicity, double jeopardy (once jeopardy attached in either case), or because of duplicity in each case.

Even the Government has unwittingly spotted evidence of a problem in these cases. At page 37 of its

Opposition, lines 15-18 the Government innocently states – "The Sacramento conspiracy was centered around the possession of sale[sic] and distribution activities of Armando Tabarez [sic] and **the defendant's role as supplying Tabarez** [sic] with his drugs in Sacramento, focusing upon the activities in August and September, 1994." What the Government conveniently ignores in saying these things is that the drugs attributed to Mr. Delgado were, according to the Government arguments elsewhere, "cooked" at the Vincent ranch as arranged by co-defendant Gonzales!

To add to the Government's problems, at the same page, page 37 of its Opposition, lines 19-25, the Government innocently states:

> The key evidence against the defendant were the telephone calls in August, 1994. Both conspiracies involved violation of the same statutes, although one is alleged to have been a manufacturing **and distribution** conspiracy, while the Sacramento indictment **alleged distribution of methamphetamine. It is worth noting that the** only **evidence introduced at trial which** even remotely could be **construed** as **evidence of the Sacramento conspiracy, is evidence that Enrique Hernandez left the December, 1993 cook in Porterville and transported 30 pounds of methamphetamine to Sacramento.**

(Emphasis added) When one ignores the unnecessary minimization and editorializing by the Government from the preceding quote, the facts emerge and yield a revealing admission. Properly edited, the above-quoted passage would read as follows – "It is worth noting that the . . . evidence introduced at trial which . . . construed . . . evidence of the Sacramento conspiracy, is evidence that

Enrique Hernandez left the December, 1993 cook in Porterville and transported 30 pounds of methamphetamine to Sacramento."

Additional facts are provided by the Government at page 38 of its Opposition. Try as it may, the Government's Points and Authorities itself cites in a different section of the Opposition (pp. 33-35) provide the legal precedent to support Mr. Delgado. The facts provided by the Government at pages 29-32 clearly show that the Tavarez conspiracy and this case are the very same conspiracy during the same time frame and share similar defendants. Of particular relevance here is footnote 10 at page 29 of the Government's Opposition. To strain the facts to argue that these are two separate conspiracies belies logic and legal precedent.

It should be obvious to any intellectually honest person that what the Government has done here is to surgically incise one single conspiracy (Sacramento and Fresno) into two allegedly separate cases and prosecuted them in separate courts. The Government has also improperly and obviously lumped separate conspiracies into one alleged single one to introduce otherwise inadmissible evidence at trial.

Last in this issue is the Government's ridiculous attempt to force relevancy of Rosario Romero's testimony where it simply does not exist. At page 38, lines 17-21, the Government frivolously states:

> The defendant also argues that evidence of a separate conspiracy was introduced by Rosario Romero's testimony as to the 11 times she purchased equipment at the defendants direction from 1992 to her arrest in June, 1993. However,

> this evidence was relevant to the charged conspiracy. Where the indictment on the conspiracy charge sets **no definite starting date for the conspiracy**, evidence of other conspiratorial acts is admissible as **direct evidence of the conspiracy**.

(Emphasis added) The Government then panders for this Court's enjoyment *United States v. Uriarte*, 575 F.2d 215, 216-17 (9th Cir. 1978) and *United States v. Rohrer*, 708 F.2d 429, 435 (9th Cir. 1983) for support of its dubious argument. Unfortunately for the Government, these cases are totally inapplicable to the facts of this case! Here, unlike in *Uriarte* and *Rohrer*, the Government expressly alleged a specific starting date for the charged conspiracy..

Such devious statements ought to be insulting to any court of law where, as here, the Government repeatedly admits – "All defendants are charged with participation of a conspiracy to manufacture methamphetamine, **between January 1, 1993, and on or about January 22, 1994**." See, Mr. Delgado's Petition at page 5, lines 13-19. This certainly looks very much like a definite starting date for the charged conspiracy! This also certainly makes *Uriarte* and *Rohrer* inapposite and the Government's feeble and transparent Sophistry repugnant.

To add insult to intellectual injury, how the Government can argue that the testimony of Rosario Romero "is admissible as direct evidence of the conspiracy" where no *mens rea* has yet been conceived and where the conspiracy at issue has not even been gestated, is beyond all logic. Whether Rosario Romero and Mr. Delgado engaged in illicit activity in the past, that has absolutely no bearing on whether there was or was not a conspiracy in place much later – January 1993!

What the Government fails to grasp is that Mr. Delgado is raising first an ineffectiveness argument predicated upon the sum total of Attorney Araujo's failures here and not individual issues of whether double jeopardy attached here or not or whether there is one or many separate conspiracies!

C. Whether There Was Fatal Variance And Whether trial Counsel Was Ineffective In Missing The Issue

In its fatal variance argument, the Government actually all but concedes that there was indeed variance between the specific charges in the indictment and the proof at trial. What is of interest in this argument is that it actually helps the previous duplicity issue raised by Mr. Delgado and contested by the Government. It is arguing that no "substantial rights" of Mr. Delgado were affected where the Government concedes variance; it had no choice, if one bears in mind the previous discussions about testimony from Wilson and Romero.

At page 43, lines 5-9, the Government concedes:

> Although the Government may have also demonstrated the existence of a conspiracy **not contemplated by the indictment** (that relating to the events on January 20, 1994), this does not constitute a "prejudicial variance", especially given that the defendant was not alleged to have any participation in that conspiracy and the jury could not have convicted him of that conspiracy in error.

(Emphasis added). Why it was that the Government had to demonstrate the existence of yet one more separate conspiracy can only shed light on the duplicity issue *supra*.

D. Ineffective Assistance Of Appellate Counsel

It is obvious from the record and the declaration filed by Attorney Araujo that Mr. Delgado was denied effective assistance by his counsel's failure to move to suppress the Casio data bank. The remaining issue is whether that ineffective assistance resulted in prejudice to Mr. Delgado.

The data in the Casio bank was argued to the jury by the Government at closing and provided key connections between Mr. Delgado and many of the co-defendants, especially Gonzales and the Patterson garage; the data was significant and played central role at trial.

In his sworn declaration, which neither this Court nor the 9th Circuit has reviewed, Araujo clearly states that he failed to follow his normal practice in this case. He also swears under oath that the Casio data bank "played a significant part in the Government's case as it established a **significant connection** between Mr. Delgado and some of his alleged co-conspirators." The Government has not contradicted Attorney Araujo's declaration. On the other hand and without any sworn declaration, the Government downplays the significance of the Casio data bank and mostly relies upon the incomplete analysis by the 9th Circuit who **did not have** Attorney Araujo's declaration! In this respect, another **factual dispute** has arisen in the pleadings at issue before this Court. Here again, an evidentiary hearing is necessary.

However, as before, the Government provides facts at page 54 to contradict its own arguments. There, at lines 23-27 the Government admits – "In this case, the relevance of the Casio databank was demonstrated by the fact that the defendant was in possession of the telephone numbers for Robert Gonzales and Howard Patterson's garage (where Gonzales, the defendant and the defendant's workers gathered when cooking methamphetamine at the Vincent ranch in Porterville)." This is the virtual equivalent of the smoking gun! How the Government can say that such evidence caused no prejudice is illogical to imagine. As noted above, the Government considered the Casio databank central enough to argue it at closing.

CONCLUSION

This Traverse has covered many, but not all, of the points raised by the Government's Opposition. Some of the points were covered, necessarily, in great detail while others were totally ignored. This does not mean that Mr. Delgado does not dispute the arguments he ignored. Additionally, many factual disputes have been identified here. Mr. Delgado respectfully submits that an evidentiary hearing is inevitable if due process is to be observed.

Respectfully submitted,

Dated: 2-28-00

/s/ Ezekiel E. Cortez
Ezekiel E. Cortez, Esq.
Attorney For Petitioner
Gerardo Delgado-Garibay

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, vs. GERARDO DELGADO-GARIBAY Defendant.	Civil Case No. 99-5186-OWW Criminal Case No. CR-94-5011-OWW **Proof of Service**

I, the undersigned, hereby declare as follows:

1. That I am over eighteen (18) years of age, a resident of the County of San Diego, State of California, not a party in the within action; that my business address is 1010 Second Avenue, Suite 1850, San Diego, CA 92101;

2. That on this date I served the within PETITIONER'S TRAVERSE on opposing counsel by causing to be delivered an original and three copies thereof to the Office of the Clerk; and

3. That I mailed additional cop(ies) to:

GERARDO DELGADO-GARIBAY

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 2000 at San Diego, California.

/s/ Barbara Godoy
BARBARA GODOY